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No. 88-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE SALDANA,

Petitioner,

—v.—

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner Jose Saldana submits this reply brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

THE EXHAUSTION ISSUE

The first question presented was whether the State's own misconduct can

properly form the basis for a decision that a habeas corpus petitioner has not satisfied the exhaustion requirement. Apparently unable to answer that question, the District Attorney pretends that the misconduct never occurred.

The District Attorney is dead wrong when he asserts that the Second Circuit based its exhaustion decision upon "a factual determination that the petitioner [i.e., Mr. Saldana] had not fully apprised the state courts of the facts underlying his complaints." (Brief in Opp., 11; emphasis supplied).[1] To the contrary, the Second Circuit explicitly held that the state courts did not have the opportunity

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1 The citation "Brief in Opp., __" refers to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, dated December 21, 1988.

to consider Mr. Saldana's claims because the District Attorney misstated to the Appellate Division "that [Mr.] Saldana's motion to dismiss was untimely and that the issue was, therefore, not preserved for appeal." 850 F.2d at 118 (Pet. App. 7-A).[2] There is no factual dispute on this issue: even the District Attorney was forced to admit during oral argument before the Second Circuit that his position in the Appellate Division on the timeliness of Mr. Saldana's motion to dismiss the indictment was "erroneous." 850 F.2d at 118 (Pet. App. 7-A).

Once it is seen that the Second Circuit based its decision upon a

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2 The citation "Pet. App. __" refers to the appendix to Mr. Saldana's Petition for a Writ of Certiorari, filed September 26, 1988.

misrepresentation by the State, any claim that there is not an important question of federal law at stake is absurd. The Second Circuit did not find that the false statement was innocent.[3] The Second Circuit's decision is therefore vitally important because it rewards misconduct -- perhaps even intentional misconduct -- by the District Attorney.

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3 Although the Second Circuit did not address the question of intent, there is evidence that the State knew that its position in the Appellate Division was false, since an Assistant District Attorney had previously acknowledged to the trial court under penalty of perjury that the State received Mr. Saldana's motion to dismiss on September 17, 1980 -- not on October 17, 1980 as the State represented to the Appellate Division. (2d Cir. App. 134-135; see Second Circuit General Docket (9/4/87) reprinted at Pet. App. 124-A).

The Second Circuit's decision also conflicts with applicable decisions of this Court. The requirements of the exhaustion doctrine are satisfied "[o]nce the federal claim has been fairly presented to the state courts." Picard v. Connor, 404 U.S. 270, 275 (1971); Vasquez v. Hillery, 474 U.S. 254, 257 (1986). Here, as set forth in detail in the Petition, there can be no question that Mr. Saldana presented the state courts with all of the essential legal and factual allegations upon which his due process claims are based. (Pet. at 17-18). The Second Circuit nonetheless concluded on the basis of the District Attorney's misrepresentation that Mr. Saldana had not exhausted his state remedies. The conflict with the holdings of this Court makes the Second Circuit's

decision a compelling subject for review by this Court.

THE HARMLESS ERROR ISSUE

The District Attorney also skirts the second question raised by Mr. Saldana's Petition: whether a federal court, having found an unconstitutional deprivation of a state created right, can refuse to apply the remedy which the state has provided to cure violations of that right.

The District Attorney incorrectly portrays Mr. Saldana's due process claim as an allegation that the State of New York misapplied its own law. (Brief in Opp., 12). But that is a gross mischaracterization. New York violated due process -- not by misapplying its own law -- but by misleading Mr. Saldana into

forfeiting his grand jury rights.[4] The Second Circuit did not disturb the District Court's determination that due process was infringed.

The Second Circuit's decision raises an important question because it means that a federal court, having found that a state created right was unconstitutionally abridged, can second guess the state on the value to be attached to that state created right. Here, the State of New York has determined that the deprivation of a defendant's right to appear before the grand jury is so important that it can never be harmless. N.Y. Crim. Proc. Law.

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4 For example, the District Attorney promised in open court to write down Mr. Saldana's request to testify before the grand jury, but then argued successfully that Mr. Saldana had no rights because they were not preserved in writing.

§§ 190-50(5)(c), 210.20(1)(c) and 210.35(5).[5] A federal court should not be permitted to say the right is less

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5 The District Attorney's reliance upon Chapman v. California, 386 U.S. 18 (1967), for the proposition that the violation of Mr. Saldana's rights constituted a harmless error is plainly inapposite. Chapman holds that a state's failure "to accord federal constitutionally guaranteed rights is . . . a federal question. . . ." Id., 386 U.S. at 21. But that decision does not address the question of whether a state's harmless error rules are the proper federal standard to determine whether the violation of a state created right is harmless. Nor does the District Attorney's reliance upon the decision in United States v. Mechanik, 475 U.S. 66 (1986), advance his arguments. Mechanik applies to federal grand jury proceedings, not to the arbitrary deprivation of state created grand jury rights. And, in People v. Wilkins, 68 N.Y.2d 269, 508 N.Y.S.2d 839 (1986), the New York Court of Appeals specifically declined to adopt the rule in Mechanik that conviction after trial may render a defect in grand jury proceedings harmless error.

important than New York believes the right to be.

Moreover, the District Attorney does not seriously dispute that the Second Circuit's decision is contrary to the decisions of this Court in Griffin v. Illinois, 351 U.S. 12 (1956), and Evitts v. Lucey, 469 U.S. 387 (1985). The District Attorney attempts to distinguish these cases by arguing that "in neither case did the Court even mention the words 'harmless error.'" (Brief in Opp., 14). But that is precisely the point. In both Griffin and Evitts, having found a due process violation of a state created right, this Court remedied the violation by ordering compliance with the appropriate state created remedy. There was no need for any further harmless error analysis.

Therefore, when the Second Circuit did not challenge the District Court's finding that due process had been violated, it should have applied the automatic remedy created by New York State for violations of the right to appear before the grand jury by reversing Mr. Saldana's conviction. Apart from accepting the case to assure the continued vitality of Griffin and Evitts, review is required to preserve important principles of federalism i.e. to prevent federal courts from ignoring state policies in cases dealing with the arbitrary deprivation of state created rights.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated September 26, 1988, the Petition should be granted.

Dated: January 4, 1989

Respectfully submitted,

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